UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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IN RE: METHYL TERTIARY BUTYL ETHER ("MTBE") PRODUCTS LIABILITY LITIGATION	00 MDL 1358 00-cv-01898 (SAS) 04-cv-04968 (SAS) 07-cv-10470 (SAS) 14-cv-06228 (SAS)

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June 18, 2015
2:30 p.m.

Before:

HON. SHIRA A. SCHEINDLIN,

District Judge

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THE COURT: All right, hello. Who is on the phone? I'll read the names. I have Mr. Ehrlich.

MR. EHRLICH: Yes, your Honor.

THE COURT: Mr. Dunham.

MR. DUNHAM: Yes, your Honor.

THE COURT: Mr. Cameron? Is there a Mr. or Ms. Cameron? Camerson.

MR. McMANUS: Hello, your Honor. This is Keith McManus. I work with Mr. Camerson, and he won't be joining us today.

THE COURT: That's helpful to know.

Mr. Cepeda Diaz?

MR. CEPEDA DIAZ: Yes, I'm here, your Honor.

THE COURT: Ms. Maldonado?

MS. MALDONADO: Yes, your Honor. Good afternoon.

THE COURT: Good afternoon.

Mr. Couret?

MR. COURET: Yes, your Honor. Good afternoon.

THE COURT: Ms. Smitha or Ms. Smith?

MS. SMITH: Yes, your Honor.

THE COURT: Ms. Hirsch?

MS. HIRSCH: Yes, your Honor.

THE COURT: Mr. Carter?

MR. CARTER: Yes, your Honor.

THE COURT: Ms. Farley?

MS. FARLEY: Good afternoon, your Honor.

THE COURT: Ms. Hall?

MS. HALL: Yes, your Honor.

THE COURT: Mr. Covey?

MR. COVEY: Yes, your Honor.

THE COURT: And Mr. McCall? Is there a Mr. McCall on the phone? Duke McCall? No?

Okay, so the folks on the phone, I think, are just going to be listening in but will not be participating because there's a lot of lawyers in the room; it would be difficult to have the participation. So I hope you can hear most of what goes on. I'll ask the lawyers to speak up and hopefully you'll hear.

So we have Mr. Walsh?

MR. WALSH: Good afternoon, your Honor.

THE COURT: Good afternoon, Mr. Axline.

MR. AXLINE: Good afternoon, your Honor.

THE COURT: Mr. Miller.

MR. MILLER: Good afternoon.

THE COURT: Mr. Gilmour.

MR. GILMOUR: Good afternoon, your Honor.

THE COURT: Mr. Parisi.

MR. PARISI: Good afternoon.

THE COURT: That's it for the plaintiffs' side, right?

MR. PARISI: No, I'm not on the plaintiffs' side.

THE COURT: Oh. The way they put it on the seating chart, it looked that way. Okay. So, for the plaintiffs, there are four lawyers here, that's it, right, Walsh, Axline, Miller, Gilmour?

MR. AXLINE: Correct.

THE COURT: Mr. Pardo.

MR. PARDO: Good afternoon, your Honor.

THE COURT: Mr. Bongiorno.

MR. BONGIORNO: Good afternoon, your Honor.

THE COURT: Mr. Riccardulli.

MR. RICCARDULLI: Good afternoon, your Honor.

THE COURT: Mr. Parker.

MR. PARKER: Good afternoon, your Honor.

THE COURT: Mr. Anderson.

MR. ANDERSON: Good afternoon.

THE COURT: Mr. Tuite.

MR. TUITE: Good afternoon, your Honor.

THE COURT: I'm sorry, I'm having trouble with that.

Mr. Stack.

MR. STACK: Yes, your Honor. Good afternoon.

THE COURT: Good afternoon.

Mr. Bollar.

MR. BOLLAR: Good afternoon, your Honor.

THE COURT: Ms. Hannebutt.

MS. HANNEBUTT: Good afternoon, your Honor.

THE COURT: Mr. Condron.

MR. CONDRON: Good afternoon, your Honor.

THE COURT: Ms. Weirick.

MS. WEIRICK: Good afternoon, your Honor.

THE COURT: Now Mr. Parisi.

MR. PARISI: Good afternoon.

THE COURT: Everybody else who's here, if any of you do end up speaking -- and I recognize many of you -- please, everybody, be sure to state your name each time. It's difficult for the court reporter. I know you folks for years but he doesn't, so each time, stand and say, "this is Mr. Axline and" or "this is Mr. Pardo and" each time, so we get a pretty clear record.

We actually have a fair amount of business today, and I hope to move through it as efficiently as possible. I am starting with Pennsylvania. There are questions about the final preparation of the case management order, and there is some disagreement as to language and not just language but what has to be done by whom and when. And so I will try to move through all of that.

There's a disagreement in proposed section 2(a) regarding MTBE release site lists, and defendants want the CMO to require plaintiff to identify every release, a site report of the commonwealth or of which the commonwealth is otherwise aware. And the commonwealth wants to limit the list to only

those reported to it.

It seems to me this is a small disagreement and can be resolved by the following language: "By December 31st, 2015, plaintiff shall identify every release site reported to the commonwealth or which the commonwealth discovered through its own investigation." And that's it. Forget the word "aware"; it's too vague. So I'd be happy to read that again. "Or which the commonwealth discovered through its own investigation." So either reported to it or you've already discovered it and you've probably made a record of that somewhere if you've discovered it, but I'm not going to "aware of" to it.

All right, next, there's a disagreement about potable wells with MTBE detections. And the defendants' position is that the commonwealth needs to identify every well that has a detection or even, I guess, that could have a detection. Plaintiff says, you know, unlike a lot of these cases, we don't own or operate these wells, and if we were to go out and be required to test every well, there are a million of them, and that would be $100 million spent, and we don't think we should have to do that.

And there's a dispute about who's going to pay for that too. The defendants say in their letter, whether plaintiff can recover from the cost of searching out and sampling wells is an issue for another day. Plaintiffs say, well, not really, not if you're going to tell me I've got to go

out and do a million wells at the cost of a million dollars.

So I think the answer to this at this time is that plaintiff only needs to identify the information that is currently in its possession, custody or control. That's the usual rule in discovery. They don't have to create a record of that which does not exist.

So if they have a documentation in their possession, custody or control, that has to be defined carefully, regarding wells that have detections or have been tested or have no detection, whatever it is, they have to turn over such records, but they're not directed that they're required to test a million wells.

Now, whether there is going to be a question down the road as to whether by not identifying something they will have waived a claim, I think that is an issue for another day. In other words, if they're not aware of a detection and a detection occurs six months from now or five years from now, that may be a new and timely claim. So I'm not about to rule on that issue, as to whether by their failing to identify a particular well today they have waived a claim forever.

I can say on the record that I doubt it, that if and when they detect something, a claim may materialize at that time, but that's not a ruling, that is my inclination, but it may not be for me. Who knows when that is going to occur? It could occur 30 years from now, who knows, but that's my ruling

for now on the wells issue.

The third dispute at section 2(c) has to do with really a related issue: Defendants want the plaintiff to produce the maximum and most recent MTBE detection data for each release site and each well. Now, I think one response that the plaintiff gives is that defendants actually have done MTBE sampling for release sites that they own or operate.

So I think the ruling is directed to both sides: Everybody has a date that you will negotiate and pick for the CMO, at which they have, to both sides have to, identify the maximum and most recent MTBE detection date or for each release and each well, to the extent that they have possession, custody or control over such a record.

So if the defendants own and operate -- you know the rule: If you want to confer, raise your hand, say, can I please confer? Because I find it distracting for you to confer while I'm speaking. If you want a moment, I'm happy to take a break. You want a moment?

MR. BONGIORNO: Sorry, your Honor. No.

THE COURT: If you need one, just say so.

In any event, both defendants and plaintiff are directed to identify any record they have of any sampling data period. So, for the defendants, it will probably be the sites they own and operate. For the plaintiff, it would be those that are reported or which they investigated, and it can be the

same date. And that advances the ball for everybody.

CMO4 declarations -- and I'm using your language as a shorthand but I think the lawyers here know what that means -- the plaintiffs wants to at a provision that requires the defendants to produce CMO4 declarations regarding information on the shipment and distribution of gasoline into and within Pennsylvania to sort of, how shall I say it, aid everybody in getting things identified. The defendants say, well, the most reliable way to identify release sites is through a review of the Department of Environmental Protection's site remediation files and the Underground Storage Tank Indemnification Fund files, USTIF, and I agree that that is good.

So the plaintiff, commonwealth, must review the DEP files, the USTIF files, and I think you knew that, but the question is: Do the defendants have to do the CMO4 declarations? And I think the answer is yes. The only issue is timing.

One could say, oh, sure, eventually defendants have to do it, but why does it have to be part of the CMO, because the CMO should be settling a schedule all around? So I realize that date may be further out than a date for more easily accessible information, but it has to be done. So I do think these declarations should be filed, but you need to negotiate when in the process. Eventually, I'm sure, you knew you were going to be asked to do those declarations; you've done them in

other cases.

So it's only a matter of when. And I'm not ordering a date right now. I'm telling you, put it in, work it out, talk it through, figure out who goes first, what's logical. And I already said that the records from DEP and USTIF are probably more readily available and should come first. But that doesn't mean you shouldn't work out these declarations eventually. I've explained where you should.

You want to say something, Mr. Pardo?

MR. PARDO: I wanted to ask for your permission just to confer for five seconds.

THE COURT: Okay, good.

(Pause)

MR. PARDO: Thank you.

THE COURT: Okay. So we go on.

Now, motion to amend the complaint: Now, here, the commonwealth wants to file a motion to amend the complaint. The first thing I'd like to do, at all costs, is avoid another motion. I'd like to just talk about amending the complaint, if we could here.

First of all, they want to amend the USTIF claim, and I already said they could. I put it in the opinion, if you have things to add to that claim, I dismissed it with leave to replead, so you have leave to replead that. That's easy.

Then you want to add two new corporate entities

related to LUKOIL. And to individual defendants related to LUKOIL, you want to add a fraudulent transfer claim against LUKOIL America and new defendants, LUKOIL North America and LUKOIL Oil Company and individual defendants, again, and they you want to beef up the veil-piercing claim to include additional allegations.

Some of these seem yes, and some of these seem no. I think the short answer is: It is futile to add a fraudulent conveyance claim because 11, U.S.C., Section 544(b) says that the trustee in bankruptcy has exclusive right to bring such an action, and did, and it's done, and the plaintiff can't do it because their trustee did it. So I think that's pretty straightforward. I think the fraudulent conveyance action is out because it was done by the liquidating trustee in the GPM bankruptcy.

So, as far as the veil-piercing, yes, I don't see why you can't beef up allegations. It's just an amended complaint. It doesn't mean you're winning anything, but everybody should always plead the best and fullest complaint they can. So if you have new allegations, you should put them in. I know LAC says, under Maryland law, you're never going to prevail. But I'm not prepared to decide that. I'll decide that when it's fully briefed.

So, add the allegations. They'll move to dismiss that claim under Maryland law, and if they're right, they'll win and

that's the end of it. But you might as well plead the best set of claims you can. So I have no problem with your amending to add veil-piercing claims.

I also note that it might be actually direct liability that you're now pleading as to LUKOIL North America LNA because you say you've discovered evidence that they may have directly owned sites. If you haven't, you haven't, so you can certainly add that.

I already mentioned fraudulent conveyance, no? I think that's it.

Well, then the individual defendants wouldn't be added. If you can't add the fraudulent conveyance claim, you aren't going to be adding the individuals either. So, actually, I think I just talked of everything but Pennsylvania.

Now that I did, anybody want to say anything?

UNIDENTIFIED SPEAKER: Yes.

THE COURT: A person on the phone does? I thought you folks were just observing. Who said yes? Maybe she wasn't speaking to me.

Anybody present in the courtroom want to say anything about Pennsylvania, or did I take care of the problem for now?

Mr. Miller?

MR. MILLER: Good afternoon, your Honor. You've substantially helped us.

THE COURT: Good.

MR. MILLER: But I need to explain something. It may relate to timing, it may relate to the ultimate form of how we approach the problem.

We have -- the Department of Environmental Protection has approximately 16,000 reported releases and tens of millions of documents concerning those releases located at six different facilities, each of which resembles a warehouse. Within those documents, there are undoubtedly references to detections of MTBE in a well. The time required to review tens of millions of documents to find each private well that was near a service station and was tested by the environmental consultant, which had nothing to do with the state other than the fact that these investigations must be reported to the state -- we weren't running the investigation.

THE COURT: Let me interrupt. These are not electronically searchable?

MR. MILLER: We could scan all those documents. We certainly intend to make the documents available if the defendants want to copy them, but even if we scan them -- let's say we scan for MTBE as a term --

THE COURT: Then could you OCR? Could you do it just by looking for the word?

MR. MILLER: Let's say you scan for MTBE for a well. All the monitoring wells would show up being referred to on every page.

So unless they use the term "private well," which seems unlikely, they may use a name for it like the property owners, it would be very difficult even if we scanned every document and did discrete searches. So we're literally talking about reading every page. The burden is extraordinary.

THE COURT: Burden?

MR. MILLER: Yes.

There is a solution. I don't think that -- given the number of wells we're talking about, a million private wells, only half of which, 450,000, we know the location, I don't think we're going to ever --

THE COURT: I'm sorry, I didn't understand the last thing. Does that mean you don't know the location of the other 550,000?

MR. MILLER: That's correct.

THE COURT: Oh, okay. Go ahead.

MR. MILLER: They're historical wells before the registration program was started.

THE COURT: Now I understand the statement. You know the location of only 450,000 of 1 million?

MR. MILLER: Yes.

I don't think we're ever going to have a day when we present individual evidence on each private well that was impacted by MTBE and which station did it, and we can still make a valid claim. I'm going --

THE COURT: A claim for what?

MR. MILLER: For -- let's just talk about New Hampshire for just a moment because they presented their evidence in three months, not three plus years, which would be a discussion of individual gas stations, every single one in Pennsylvania and every well, you're talking about a trial in inestimable length.

THE COURT: But we have not been doing that. We've tried to do a bellwether type trials anyway or focused case type trials anyway.

MR. MILLER: Yes. This comment I'm about to make doesn't relate to a bellwether trial, which is clearly much shorter. But what if the bellwether trial doesn't resolve the issue and a statewide claim proceeds against those who have not settled?

In that event, what New Hampshire did in their case is they presented evidence that they took a statistically representative subset of private wells and used the results from that subset to estimate scientifically and accurately, in our view, the total damage statewide, and they didn't need to go out and test every well in New Hampshire, because if you do a representative sample and say 12 percent of the wells have MTBE in it, you can apply that percentage to the total.

They did --

THE COURT: That sounds good for damages, but not for

remediation.

MR. MILLER: Remediation is a smaller group. We have 16,000 releases. So that's easier to do. It's a different issue, but at the moment, I'm talking about wells.

So if we go and spend unbelievable effort and a lot of money to identify individual wells, will it affect the trial if we have a strategy to do a trial in a more reasonable period of time that focuses on a statistical approach to estimating the damage claim? I can't see how it will ever help them.

THE COURT: How it will ever?

MR. MILLER: Help them understand our claim. That's going to become very clear when the experts testify. And we can talk about how to approach the problem of making sure that that expert's testimony is adequately previewed with the defendants so they can prepare for it. That's a separate issue.

But the idea of developing a comprehensive list by going through tens of millions of pages, reading until you go blind, trying to find a single entry that is very difficult to identify electronically through scanning the documents, which even if we did that, we could not possibly do it in 2015, even if we were lucky in the electronic interpretation of the records.

So I'm suggesting to you that at this point in time, if you require us to do a list, we need a much longer time

period, and I'm suggesting that doesn't further the case, it doesn't help the defendants. They are the ones who hired the consultants that tested those private wells, frankly, in many of the release sites. Not all, but many. So they already have that information.

THE COURT: Well, couldn't there be a combination of ideas? One, you have the statistical sampling type proof from the point of view of proving damages, but you're always going to have to try some releases and the wells that are impacted, and that's a matter of focus -- well, focus releases that we've done before in other cases, and then all the wells associated with focused releases, so to speak, I think, as we call them focused sites, but then on those wells, you'd have to produce it.

MR. MILLER: If we decide with the Court, whatever you order, to do focused sites, there's no question in my mind that's a manageable burden. We can identify the wells --

THE COURT: Right.

MR. MILLER: -- given adequate time, and we can do that. That's not what I'm discussing.

THE COURT: No, no. You would have a combination of a statistical approach, but you'd also have a number of sites where you fully discover every well you say is impacted as a result of the release of that site, every well. And in those instances, whether it's 20, or 40, or however many we choose,

then you have to go for every well in the focus sites, and you say you can do it?

MR. MILLER: Yes. No question. That's manageable.

THE COURT: Right. Okay.

Mr. Pardo.

MR. PARDO: Your Honor, before we get too far down that road, I want to make sure I know you're not ruling today, there's no ruling here, I haven't heard any ruling.

THE COURT: You haven't heard any rulings, but you heard some rulings.

MR. PARDO: No, no, no, on this issue --

THE COURT: Okay.

MR. PARDO: -- of statistical extrapolation.

THE COURT: Correct.

MR. PARDO: I just want to be clear. We're taking about New Hampshire. As you, I think, know, that case is up on appeal right now. And we do not believe that statistical extrapolation is a constitutionally fair way to determine damages, nor to determine any of the other issues that have always been the subject of normal discovery, normal proofs in this case, causation --

THE COURT: Is that one of the issues on appeal?

MR. PARDO: It is.

THE COURT: Statistical sampling was the right approach?

MR. PARDO: That is one of the issues.

THE COURT: Where is this pending, the highest court of New Hampshire?

MR. PARDO: Correct. New Hampshire Supreme Court, your Honor. Correct, your Honor.

THE COURT: Where is that up to? Argument, brief?

MR. PARDO: Just argued.

THE COURT: Argued?

MR. PARDO: So I know you haven't ruled on this. This would be something that it would be a sea change from how we've done the cases for many, many years on this MDL, and I would respectfully submit that if we were even thinking of going in that direction, we ought to have briefing -- the opportunity to brief you on this because there are, in our view, some serious constitutional --

THE COURT: Well, it's also interesting to know what the New Hampshire Supreme Court has to say. Since it's been argued, it would be interesting to see how it comes out.

MR. PARDO: But I've heard --

THE COURT: Also, the numbers here might far surpass New Hampshire. Pennsylvania is a big state. And even if it was acceptable there, which is not what you hope will be the outcome of the appeal, but even if it is, you would still have an argument here that it's a different case anyhow. So I understand you certainly don't want that issue to be decided

without full briefing. I understand that. I understand that.

MR. PARDO: Right.

Now, we know, or I guess plaintiff knows, where 450,000 of these private wells are. There's another 550,000 that I guess they don't. I would submit if they don't know where those wells are, maybe they shouldn't be in this case, okay. But for the 450,000 that they do know where they are, maybe those are the private wells they start with.

THE COURT: But did you hear the numbers? Even if it was half of the numbers that Mr. Miller described, it's a huge number of records, huge, and from the plaintiffs' perspective, and maybe even mine, we'd all like it to be done within our lifetime.

Now, you're younger than I am, so your lifetime is longer, mine is shorter, so I want to get it done, and so that's the problem. Even 45 percent of the numbers that Mr. Miller said is a long, long task and very extensive. The issue is does it have to be done. We've always taken the focus site approach with the associated wells. Now he's saying he's got another suggestion for statewide statistical proof, which apparently was used in New Hampshire. I know nothing, actually, about it except what I heard today.

So I don't know whether that's a good idea or not, and what a state high court is at least going to tell us doesn't bind me, but it would be interesting to know. But we could

certainly start with the focus approach and find some way to select geographically, let's say, around the state of Pennsylvania, so we can get all the different kinds of areas, you know, urban, suburban, rural, near water, not near water, however you wanted to choose 50 or whatever sites, and start with that. That's what we've done before. But to tell him he's got to do it for 450,000 sites of which he knows the location, it may be the burden outweighs the benefit at this point.

So you're right that I'm not ruling, but I probably said enough to give both sides a lot to talk about in any meet-and-confer on how to continue, and then if you're at an impasse, and they insist on this sampling idea and want to start briefing even before the New Hampshire high court rules, so be it, it will have to be briefed because I don't know anything about the technique and why it would be valid or wouldn't be valid.

I assume there were experts in that case that said it was valid?

MR. MILLER: Yes, your Honor, of course.

THE COURT: Sure. But there were defense experts who said it wasn't?

MR. MILLER: Of course.

THE COURT: Sure.

No, I understand that.

MR. MILLER: It's all predictable.

THE COURT: Yes.

MR. PARDO: For me, your Honor, and maybe for some of the other defendants, this is not what you're doing, but it's a little frustrating to hear this, because, of course, we have a complaint in this case that alleges that there are private wells that have been impacted.

THE COURT: Oh, but there are. They know there are private wells that have been impacted. They don't know how many, they don't know how many locations. They surely know there are -- it's a correct statement that there are private wells that have been impacted. It doesn't mean all 1 million. So that's the issue. They say -- did they plead each and every private well in the State of Pennsylvania? No. I understand.

MR. PARDO: But let me generally push back on that. They say that, and we say we know that to be true, but I don't know that to be true. I haven't seen that.

THE COURT: Wait, wait. You're talking in generalities. You don't know that there's any private well that's been impacted? You think it could be zero?

MR. PARDO: Well, it could be. I doubt it, to be honest.

THE COURT: I doubt it, too.

MR. PARDO: Of course. But my point is he has to know -- to assert that in his complaint, he has to know that

there are wells out there that have been --

THE COURT: I'm sure he does know there are wells, the question is does he know about 20, or a hundred thousand, or 700,000? I don't know what he knows, but I'm sure he knows there are some.

Now, the question is, how many does he have to tell you about now, or does he have to research, does he have to go through -- what was it? How many millions of documents in six locations?

What was that number?

MR. MILLER: Tens of millions. I can't give you a precise number.

THE COURT: Tens of millions is good enough.

So there's tens of millions of pieces of paper, there's six locations. They're paper, they're not even electronic at this point. That's what I know.

So he could do it at great cost and delay, but you know those twin words, cost and delay, are what we try not to do. So I'm trying to see if there's an approach that can be taken that would eliminate undue cost and delay.

And, actually, identifying every single private well that's been impacted seems to me almost a tactic to make sure litigation can't move at all. So -- okay, you're paid to be tactical, I get that, but let's see if there's a solution that works, and I think you think it's not statistical sampling.

MR. PARDO: I'm certain it's not.

THE COURT: Well, from the defense point of view, I know your position, I'll be curious what the New Hampshire Supreme Court -- and it could go higher than that. But in any event, that's for another day.

The focus approach, though, we have used repeatedly in this litigation, so I think you need to talk to each other.

MR. MILLER: Your Honor, I'm happy to confer with counsel, and as soon as we identify the focus sites, I think we can work on a good description of what we owe them. It will be generally consistent with what we've done in the past. It shouldn't be hard for us to work out.

THE COURT: I think we took that approach in New Jersey, which is also a big state.

MR. MILLER: Yes.

MR. PARDO: We'll be happy to talk.

THE COURT: That's all we can do today because like you, Mr. Pardo, I didn't know this argument was coming about this sampling, and how it was done in New Hampshire, and the experts. I'm just not up to speed.

MR. PARDO: Fair enough.

THE COURT: Which does take us to New Jersey.

MR. AXLINE: I'm sorry, your Honor.

THE COURT: Go ahead, Mr. Axline.

MR. AXLINE: There was one other point which you

touched on that I'd like to respond to, and that's the fraudulent transfer.

THE COURT: Oh, I didn't touch on that. I think I said it was over because the trustee brought the action, and under the bankruptcy statute, exclusive jurisdiction and whatever, that's it.

MR. AXLINE: So under 544(b), which was cited to us by the defendants for the first time in their reply letter --

THE COURT: Is that the bankruptcy statute that I cited?

MR. AXLINE: Yes. 11 U.S.C. --

THE COURT: 544(b), there it is.

MR. AXLINE: Yes.

The entities that we want to sue for fraudulent transfer are not the bankrupt party, they are the other entities that were not involved in the bankruptcy that participated in the fraudulent transfer. I guess what I'd like is to ask for a little time to look at this issue more closely and perhaps submit a short letter brief to you on the question of whether 544(b) applies to claims against nonbankrupt parties.

THE COURT: I think that's only fair. That was raised at the end, and I even had in my notes to ask you if you could show me why that doesn't foreclose it, and that's exactly what you're saying, give me a little while to write a letter

researching this point and explain why it may not foreclose this action. But it was a fraudulent conveyance action, which raises the same issues, and it was brought by the liquidating trustee in the GPMI bankruptcy. So I understand what you're saying, that these were not bankrupt entities, but it may be that the action raised the same issues, I don't know.

And you, Mr. Tuite?

MR. TUITE: Tuite.

THE COURT: Tuite, I know that. I know that.

MR. TUITE: Thank you, your Honor. On behalf of LUKOIL Americas Corporation, we don't have any problem with his submitting a brief --

THE COURT: He said a letter for now.

MR. TUITE: -- a letter brief, but I do want to point out that the same parties they want to sue in this action were the parties that were sued in the bankruptcy court.

THE COURT: That's what I thought. They may not have been in bankruptcy, but they were the same parties that the liquidating trustee moved against. I thought so. I think it's really the same action.

But, Mr. Axline, to his credit, said let me look at this action in the next few days, let me research it and dig down, and see if I can make the argument or not. And I guess if his research tells him he can't, he won't, but he hasn't had really a chance to respond to the statutory argument that says

that a fraudulent conveyance claim is foreclosed. He may reach that conclusion, I don't know.

MR. TUITE: Thank you, your Honor.

THE COURT: If he doesn't reach that conclusion, not surprisingly, and you need to submit a surreply, so to speak, letter, that's okay because I want to understand the issue. And then we talk about it anyway, that's not a full briefing, it's letters. And we all like to learn things in the law most days. So we'll see.

Yes, Mr. Bongiorno?

MR. BONGIORNO: Thank you, your Honor. Before we move on, might I confer with Mr. Pardo on a couple of things before we say all set?

THE COURT: Yes.

MR. BONGIORNO: Thank you.

(Pause)

MR. BONGIORNO: Thank you for indulging us, your Honor. We are now all set.

THE COURT: Good. Okay.

So we go to New Jersey. I went back to the bankruptcy statute.

All right. The New Jersey plaintiffs also want to add this same fraudulent transfer claim, and I think it's the identical issue, whether you're foreclosed by the trustees -- liquidating trustees' action in the GPMI bankruptcy. You may

well be, so I think you need to confer with Mr. Axline and together decide whether there's a letter to be written or whether you concede the point. So that's fair?

MR. KAUFMANN: Leonard Kaufmann, for New Jersey plaintiffs. Thank you, your Honor. Yes, Mr. Axline is also counsel for New Jersey. So we certainly will do that.

THE COURT: Thank you. So I won't say more about that today.

On the other hand, LNA, which is LUKOIL North America, the plaintiff now believes they have direct liability because of new discovery that it owned sites in New Jersey in which there's been releases. So to the extent that there's proof -- that they think they have proof of a direct liability, you can amend to add that.

So as I understand the amendment, the fifth amended complaint would only be with respect to LNC and related entities, and now at this point in time, the commission is only as to direct liability. You'll be discussing this fraudulent transfer issue?

MR. KAUFMANN: Leonard Kaufmann. Yes, your Honor.

THE COURT: Okay, good.

And then the only other New Jersey issue -- thank you for coming for such a short time, but the only other issue with you folks is that you agree that a number of documents were not docketed, you're going to create a joint list, apparently some

CMOs were not, some pretrial orders, some letter briefs, and you jointly requested they be added to the docket, and, of course, I agree with that. So all you've got to do is come up with your joint list, and we'll add them.

THE LAW CLERK: They have them.

THE COURT: Oh, they have them. I didn't know that.

That takes us to the Orange County Water District.

This one is also in the process of being remanded, and there are a couple of issues. One, I think, is minor, one is far more major that has to do with the declaratory relief, we'll get to that in a minute. But with respect to the one that I think is somewhat minor, defendants want to add a sentence that says something like, "All other claims for relief were either decided against plaintiff or stipulated as dismissed on the terms set forth in the applicable stipulations subject to the right of appeal, so no other claims or defendants remain at these sites for the purposes of trial after remand."

The plaintiff opposes that sentence saying it would cause confusion because there's some rights that's not being remanded instead of what is being remanded. I side with the defendants on this one. I don't think it creates confusion. I think it clarifies for the judicial panel what claims and what defendants remain in the case. No confusion, I think it should be added.

Who am I looking at? OCWD. So I think that's the easier one. You'll leave with that, and that's the ruling.

Now, the bigger one. This whole question about declaratory relief and the history of what this Court has said on different occasions apparently has caused a great deal of confusion. Declaratory relief was brought as a cause of action, I'm filing an action for declaratory -- no, for declaratory judgment. Standard cause of action, we used to call it a DJ action. And then declaratory relief is also an available remedy in many cases, and we don't usually find it until the back end of a complaint saying, and we seek a declaration that as a remedy. So I understand the difference between a cause of action and a remedy, although I'm not sure it has a whole lot of real meaning.

But in any event, in 2006, I authored an opinion which dismissed the cause of action for declaratory relief entitled "Cause of Action: Declaratory Relief Act Claim," but the basis for that dismissal was I said, well, that remedy was available under the Orange County's common-law causes of action, so it's essentially duplicative. And then OCWD asked for a clarification and I wrote: "If any of OCWD's remaining causes of action are determined to require declaratory relief, such relief remains available under those causes of action." And then later down the road, in 2011, now five years after the first ruling, I wrote: "The claims that survived included

declaratory relief with respect to future expenses OCWD may incur."

Now, that is a classic use of declaratory judgment, you know, I want a declaration that for future expenses, the defendants have to pay for. It's got nothing to do with nuisance or being duplicative, it's a classic declaratory judgment claim, and I said that one of the claims that survived is declaratory relief with respect to future expenses.

Then there was CMO116, that is 116, written in July of 2014, and that CMO set forth the remaining claims and which defendants were at each focus site as of that date, July 16, 2014, and that CMO did include declaratory relief as a remaining claim at various focus sites. Well, the defendants say, oh, you didn't really mean what you wrote, this only was supposed to reflect what OCWD intended to pursue at the trial, and we didn't think we needed to move against it because it was just a list, so we didn't object at the time. And now the defendants say, look, the water district can ask the transferor court, the trial court, to allow the remedy of declaratory relief for continuing nuisance, but this is somewhat problematic because if the trial court says it's not a remedy for continuing nuisance or there is no such claim, that wouldn't take care of all the declaratory relief sought in the OCWD action. That just has to do with the nuisance claim. And I specifically said there may be declaratory relief outside of

that particular common-law claim.

So the county says, look, it does remain available as a cause of action, you only ruled on a limited context, and the basis of your ruling was duplicative on the continuing nuisance claim, which the defendants are going to tell the trial court needs to be struck, and the trial court might agree, but that wouldn't eliminate all declaratory relief.

In fact, as I read the letters, defendants are going to say that Article III courts have no inherent authority to order declaratory relief. I don't even know what that means, as we do it all the time.

So the long and short of this one is actually I think it can be part of the remand that there is declaratory relief still in the case, and there is no reason for me to say they can't put that in based on the 2006 ruling which has been clarified many times since. So that's where I come out on that one, and you can do all the rest of your arguing to the poor judge who is the one who gets the pleasure of trying the OCWD case.

So you can speak afterward, but I might as well finish OCWD because there's another big issue. The other big issue has to do with the water district's request for clarification about the res judicata fact on the continuing nuisance claims from the Court's September 16, 2014 ruling on the BP and Shell defendants' motion for summary judgment. We discussed last

time how best to deal with this question. There were several options. There was the option of a 54(b) certification, there was an option of a 1292, I think, certification, and there was a punt which said, oh, well, just give it to the trial court and tell the trial court that the MDL judge was wrong, and that the trial judge should essentially ignore the law of the case and overrule, so to speak, the MDL court. And that's the direction I think I was heading in at that time.

But I have to say, after reading these letters, I've come around to a different view. I now think that actually 54(b) may be the right way to go. And the only big objection to it in the water district's letters is they say, if you allow that, it's going to trigger an appeal of all the prior rulings as to these defendants, not just the res judicata/continuing nuisance issue.

So my question for the crowd today is: Is that a red herring, or is that an issue? In other words, will you be raising bunches of other challenges with bunches of other rulings, or is that just a red herring, and, really, this is the one you want to take up? So, in other words, it could trigger -- it could trigger the right to appeal other issues, so does either the water district or the defendants intend to raise other issues just because the right to do so is triggered? If you get what I'm trying to say.

MR. AXLINE: I'll handle that, your Honor. Mike

Axline, for the Orange County Water District.

THE COURT: Okay.

MR. AXLINE: Yes, I have to correct what I told you last time in one sense. I told you we only wanted to take this one issue up on appeal. We thought that should be the only one to go up. I think, however, in looking at it afterwards, doing some research on this, if we go up on a 54(b) final judgment against Shell and BP, we are obligated to raise every issue --

THE COURT: What are these every issue? What's there?

MR. AXLINE: There are statute of limitations rulings.

THE COURT: Now we're talking about BP and Shell?

MR. AXLINE: Yes.

THE COURT: Not anybody else. So what was the statute of limitations ruling?

MR. AXLINE: Well, your Honor ruled that the statute of limitations precluded a common-law claims other than continuing nuisance where there were detections at a station prior to the bar date, which I think was May 6 of 2000.

THE COURT: That's those two defendants. There could have been claims against those two defendants.

MR. AXLINE: Yes.

THE COURT: Okay. So that's one.

MR. AXLINE: There were also -- and the defendants can speak to what they may want to raise.

THE COURT: I'll surely give them their turn. Go

ahead.

MR. AXLINE: Then there was a ruling on the causation issue. We moved for summary judgment on causation and nuisance. You granted us summary judgment with respect to causation at stations where a defendant --

THE COURT: Well, you wouldn't be appealing anything if you won.

MR. AXLINE: Right. But you declined to grant summary judgment on nuisance itself.

THE COURT: Okay. And you could appeal that.

MR. AXLINE: Which is what we had moved for, yes.

So those are the two issues that come to mind that I think we would be forced, if we went to 54(b) route rather than the 1292(b) --

THE COURT: I'll talk about that next. I will turn to 1292.

What about the defendants? If I were to allow the 54(b), Mr. Condron, what else might you need to raise.

MR. CONDRON: Peter Condron, for the defendants. Your Honor, it largely depends on the scope of what OCWD would be appealing.

THE COURT: Well, they just said.

MR. CONDRON: We won, so we would obviously defend on res judicata grounds to the extent they attacked the set of rejected rulings on the statute of limitations, causation

and --

THE COURT: No, but that's responding. Are there any issues that you would be raising?

MR. CONDRON: Affirmatively? I can't imagine that we would, your Honor. Mr. Axline had mentioned about you're not granting summary judgment to them on the nuisance claim. I'm not sure he could appeal that at this juncture.

THE COURT: But if it's a final judgment as to BP and Shell, that's his whole point, he needs to raise every claim that could theoretically bring him back in.

MR. CONDRON: Yes, I'm not sure that the denial of summary judgment motion to the plaintiffs is something that could be raised on appeal at that point in time, however.

THE COURT: I see your point.

MR. CONDRON: Yes.

And outside of that, again, since we would be defending --

THE COURT: That's probably right.

MR. CONDRON: -- I think we're probably in a position where we would be responding --

THE COURT: So at most, it's three issues, not one?

MR. CONDRON: Correct.

THE COURT: Maybe even two, not one.

MR. CONDRON: Depending upon what they raise.

THE COURT: Well, no, because the summary judgment may

not really be an appealable issue.

MR. CONDRON: Correct.

THE COURT: That it was denied, the opposite of denied is granted. I don't see how that brings back -- if the statute of limitations takes you out or if the nuisance takes you out, it doesn't matter.

MR. CONDRON: I think you're right.

THE COURT: Right.

So at most, it sounds like two issues, possibly three. It's still not as burdensome, I think, as sending it back to the trial court as to dismissed defendants. There was supposed to be some finality being dismissed. I understand appeals. Believe me, I understand appeals, but they're supposed to have some finality from the rulings to put them in the remand bucket, so to speak, where they're forced to almost all over again litigate an issue they won here. And, by the way, if the judge starts saying, yeah, well, I disagree with that judge on this, that's sort of a field day for both sides to say, oh, well, I see we've got a good shot here, let's reraise everything done in the last 12 years, and keep this judge busy for years, and never have a trial.

So I'm not sure sending it back is really what you want either because it could open the door to that judge reconsidering everything, both issues you won and issues you lost. So I'm not keen on that.

So what I'd like to turn to is 1292 and revisit that. So if we don't do 54(b), what do the parties think of 1292? Because I do think this issue should get heard. After all, finally these people aren't there, and they're big companies, and you want them there, so it should get heard, and hopefully fast. I think it will be faster to do an appeal right here. So what do you think of 1292 versus 54(b)?

MR. AXLINE: We would prefer 1292(b) to 54(b).

I do want to add one thing that Mr. Condron maybe overlooked or forgot. There was a ruling on primary jurisdiction, that's one that we won, and that they may decide to raise on appeal, so --

THE COURT: No, he didn't say it. He usually doesn't need you as co-counsel.

MR. AXLINE: If you're stacking up issues under 54(b) versus issues --

THE COURT: I know, but let him figure out his own.

In any event, Mr. Axline?

MR. AXLINE: So, in any event, I think that the issues to be resolved on appeal would be much more discrete and targeted under 1292(b).

THE COURT: It doesn't meet the standards? Can I, with a straight face, write a 1292(b) certification?

MR. AXLINE: I think you can. It's certainly determinative as to these parties. It's going to have a ripple

effects for all the other parties in the case. There are pretty compelling reasons for granting it.

I have a little concern that the Court of Appeals is less receptive to 1292(b) certifications.

THE COURT: Correct. I think that's true. They have to take the 54(b) final judgment unless they say it's not, but it is.

What do you think, Mr. Condron?

MR. CONDRON: I think there is a problem with 1292(b) certification on a couple of them, your Honor. First of all, I'm not sure it does actually meet the legal standard of controlling question of law and substantial grounds, et cetera.

But, more importantly, 1292(b) has to involve an order of the court that's being examined, and I think if the Second Circuit were to look at the order that you issued on res judicata, they would find nowhere in it the issue that the plaintiffs want to raise. And, therefore, I'm not sure that that issue can be certified.

The Court of Appeals, and I looked at this last night before coming up here, they take the order, they don't take the issue. So while you may recommend an issue that they look at, they have to take it from the order, and there's nothing in your order that discusses continuing nuisance because as we know, the plaintiffs didn't raise it.

THE COURT: Honestly, I don't remember that detail.

You studied it last night. I did other work last night that was a little more current for me, so I don't remember, to be honest.

MR. CONDRON: I understand.

THE COURT: But you reviewed it, and you know what's in that order, I don't.

Is he right, Mr. Axline, about the order itself? Maybe you didn't have a chance to review it either.

MR. AXLINE: Well, I didn't review it, but I'm familiar with it.

THE COURT: Well, sure.

MR. AXLINE: And this issue that we asked you initially to address, which is whether the order bars continuing nuisance causes of action, which arise each day, that arose after the consent judgments that they base their motion on, that was not directly addressed to you in the summary judgment briefing.

THE COURT: So maybe it's never been decided. Was that decided? And if so, where?

MR. AXLINE: It has not been decided, your Honor. And in our view -- that's why we brought it to you seeking clarification.

THE COURT: Well, I denied that, but maybe that was wrong. If I have not decided what to do about postconsent judgment -- releases, is that what you said?

MR. AXLINE: Yes.

THE COURT: If I never decided that squarely, it may be I should and was wrong to deny the request for clarification.

MR. AXLINE: In fairness to Mr. Condron, and I am sure he's going to argue this, he's going to say we should have raised it in opposing their summary judgment motion.

THE COURT: Yes, but that's not the best answer because nothing to take up, as he just pointed out under 1292, if I never decided it. So the law has to be a little bit flexible or we're all in the wrong business. It needs to be decided, and it should be decided here.

MR. AXLINE: We think it's obviously very central.

THE COURT: No, I understand why there was a consent agreement, but then things happened afterward, is it barred or not. If I didn't squarely address that, Mr. Condron, maybe a relatively short briefing schedule and an opinion targeted to that would give us an order that if you win, the point can be taken up on 1292 quickly, and if for some reason you lose the point, and that would put you back in the case that's being remanded, right?

MR. AXLINE: That's correct.

THE COURT: If they lose that point, and then they could also seek or be the one to seek the 1292, but they can no longer seek a 54(b), that's the problem.

But in any event, if I didn't squarely decide that, I should.

MR. CONDRON: Two points on that, your Honor. Number one, Mr. Axline is quite right, they didn't raise it, and our position is that they should have because we moved for summary judgment on all the claims in the complaint.

Secondly --

THE COURT: I'm not going to stand on that. I'll consider it a technicality now. I want to have a square ruling.

MR. CONDRON: This part isn't a technicality, your Honor. In a footnote in the brief, we are not -- I'm sorry, in your opinion, you addressed the issue of whether or not there was any continuing harm, and what your Honor found, which is correct on the facts, is that after the consent judgments were entered, when the BP judgment was entered in 2002, ours was entered in 2005, we were no longer using MTBE in gasoline at that point in California. So any subsequent release of gasoline didn't involve MTBE.

THE COURT: But why? It could have been used in 2001, but didn't leak out, so to speak, till 2007.

MR. CONDRON: No, that's not the way the system works, your Honor. The gasoline would have been long gone from the tank prior to 2007, 2005. Actually, we all took it out in about 2002 to 2003 in California. There was a ban on it in

2004. And certainly the Shell consent order, which went into place a year after that, would have long postdated any new MTBE --

THE COURT: So he's saying it's impossible.

MR. AXLINE: And that's not accurate, your Honor. It misstates the law of continuing nuisance because under the continuing nuisance doctrine, and this is what we'd like a chance to brief, is that the cause of action continues until the nuisance itself is abated. It's not the date of release, but it's the date of which the nuisance is abated that the cause of action ends, and the nuisance has not been abated at these sites.

THE COURT: And, again, there's no ruling on that?

MR. AXLINE: No.

MR. TUITE: This wasn't briefed?

MR. AXLINE: Well, your Honor, you have ruled on this before, and we put your prior rulings into our letters to you for this conference. You said, and the defendants have not denied this, that the rule is that there's a new cause of action every day that there's a continuing nuisance until it's abated.

So I really don't think there's going to be a big fight about whether that's the legal rule. I think the defendants are hanging their hat -- Shell and BP are hanging their hat on an argument that we didn't raise this in the

opposition to the summary judgment motion.

THE COURT: But you're saying, in terms of preparing 56.1 type statements, there won't really be a back dispute, you're going to concede that they didn't use it after X years, but you're going to say it's a matter of releases or contaminations that have not been abated, and that's a continuing nuisance.

MR. AXLINE: Exactly.

THE COURT: So you should be able to agree on the facts. It's just becomes a legal question that you say I have not squarely ruled on.

MR. AXLINE: Correct.

MR. CONDRON: Your Honor, I'm not sure that's entirely correct. If we're going to agree on that fact -- of course, I'm looking at the three focus sites here. The state agency in California issued something called a low threat closure plan for all three of the Shell sites. There's a question in that which says, does a nuisance exist as defined by Water Code Section 13050. For all three of the sites, the answer is no. So we do have a factual dispute on that. But setting that aside, there's no evidence that there's any continuing nuisance that was ever put in the record --

THE COURT: He just said how he defines continuing nuisance means the known nuisance has not yet been abated, and he said as a matter of law, that equals a continuing nuisance.

MR. CONDRON: We'll have the legal dispute on that issue.

THE COURT: Right. But that's a legal dispute, that's not as hard. Then there would be the question of whether the consent decree cuts it off anyway.

MR. CONDRON: Correct.

THE COURT: So there would be two steps to the legal argument, whether that is the continuing nuisance because it hasn't been abated and whether, in any event, it's cut off by the consent decree because the consent decree should cover any, I would think, contaminations that occurred up to the date of the consent decree whether or not they have been abated. That's what you bought when you settled, or at least that's what you are going to argue.

MR. CONDRON: Correct.

THE COURT: I'm helping you frame your argument.

But in any event, the point is, shouldn't I squarely rule so there's something to take up that does the trick?

MR. CONDRON: Well, we believe that you have, your Honor.

THE COURT: Not really. You just said, oh, no, you don't believe. You said I studied the order, and you never ruled on the issue they would like heard.

MR. CONDRON: You never ruled on that particular issue. You have found, however, that there was no continuing

harm in the footage in the opinion.

THE COURT: Well, a footnote is a footnote. Why don't we just get this done real fast, so that there is an explicit ruling on the open issue, so to speak, because the one you said I never ruled on, you're the one who pointed it out in reviewing --

MR. CONDRON: On his explicit issue, not on the issue that really should be this, the important one to be focused on, which is a continuing harm, and you did rule on that.

THE COURT: In this footnote?

MR. CONDRON: Correct.

THE COURT: Well, I don't know if that was a subject of full briefing or not.

MR. CONDRON: We certainly briefed it in our brief, your Honor.

THE COURT: Yes.

Since I think 54(b) is the best way to go, and even better than 1292 -- I'm on the fence. 1292, as somebody pointed out, they may not take it, and that doesn't advance anything, but since I -- since I'm leaning toward 54(b), and you say the order doesn't address the issue, then I would like to squarely write on the issue as fast as I possibly can, which would mean allowing briefing on a very limited issue. And a limited record, I think. And I would think a joint 56.1 statement that can be presented without disputed issues of

fact.

Some facts are agreed here, like you were not using it after a certain date, and their theory is that if it's not abated, it continues. And you, of course, would come back and, say, even if that's true, the consent decree cuts it off.

All right. Who's the moving party? Where am I?

MR. AXLINE: I think, fairly, the district, Mike Axline, should be the moving party.

THE COURT: I really like this one done fast because this is about to be remanded. This is holding us up.

MR. AXLINE: We could file our motion in two weeks.

THE COURT: You're reading my mind, Mr. Axline. I was thinking two weeks. So today is June 18. That's good, it's before the holiday. That's July 2nd.

MR. AXLINE: July 2nd.

THE COURT: And keep it as late as you can. Obviously I think it presents a discrete issue or two left over from the major rulings already made.

How long would you need to respond?

MR. CONDRON: Your Honor, I'm leaving the country on July 5th for a week.

THE COURT: Yes, but you're not doing it alone, Mr. Condron.

MR. CONDRON: No.

THE COURT: I know you're not. But, anyway, what were

you going to suggest?

MR. CONDRON: I would just ask for three weeks, just to give a little leeway on that.

THE COURT: July 23rd and reply?

MR. AXLINE: Ten days.

THE COURT: Oh, you got it again.

Maybe you've been doing this with me so long, that you know exactly what the schedule is going to be. So that would take you to August 3rd. That's the best I can do. And I hopefully, maybe with luck, can try to squarely address this fast. If not, I'll get to it when I get to it, but I'll try to go fast.

Okay.

MR. AXLINE: So, your Honor, this raises a related issue, and that is the suggestion to remand itself, which will be, I think, impacted by your ruling.

THE COURT: Of course.

MR. AXLINE: I guess --

THE COURT: I ruled on the declaratory half, and then there's this darn issue.

MR. AXLINE: Yes, I would suggest -- I think I would like to hear from the defendants on this, but it would make sense to hold off on the suggested remand until this gets resolved.

THE COURT: I think so.

MR. PARKER: Your Honor, Jeff Parker. I would like to address the declaratory relief point, if I could, briefly.

In 2006, your Honor --

THE COURT: I know all that. I stated it. I gave you the whole history of all my rulings. I understand what I said on one day, and I understand what I said on another day, and I reviewed each of my statements, and I conclude, I conclude, that the appropriate thing to do is to leave it in as a claim because I was told -- I went through all this already. Why should I repeat myself for the record? You can read the transcript.

Go ahead.

MR. PARKER: Your Honor, one thing, then: With respect to the 2011 opinion, they have represented in their letter that your Honor held that debt relief was a viable claim. That's actually not what the opinion said. This was in the introduction, it was a preface leading into their motion, which was their motion for summary judgment on the OCWD act, public nuisance and trespass, which your Honor denied. So it's a statement at the beginning essentially laying the groundwork or the backdrop against which you were deciding. It was not any ruling reinstating or overruling --

THE COURT: No, no, I understand it wasn't reinstating or overruling, but declaratory judgment, in some context, was not ruled out, such as future expenses. I pointed that out.

Also, it was in the list of claims. For a host of reasons, this is the better way to go. Once it's back there, and you want to move to dismiss that claim explaining this whole history, go ahead, but I think given all the various rulings I've made over time, this is the better way to go.

MR. PARKER: Thank you, your Honor. As long as we have that clear in the record, that given the opportunity back in the district court, we could move against that, we're fine. Thank you.

THE COURT: You can explain why you think it applies across the board when the original opinion in '06 clearly said it's duplicative of the continuing nuisance, and that's why I was striking it. But good luck, it's fine. As I said, you've got to keep that judge busy, too.

So I think that takes us to the Rule 12 motions in Puerto Rico. And I don't know if there's a lot to say there except that defendants complain plaintiffs have basically been too busy to talk to them, and that the plaintiffs have said, after June 15th, we promise to sit down with you. I realize today is June 18th, which is all of three days later, but the promise is there. If everybody would sit down and try to be sure that I don't have work I shouldn't have to do, the motion to negotiate would be most appreciated. I might even be agreeable to letting the motion deadline slip by a week or so, so you can continue these talks and be as efficient as possible

with what has to be briefed or not. What more can I say today? That seems to me that what I can say is that I want the plaintiff to sit down with you and be as agreeable and commonsensical as possible, and whatever is left over has to be a motion.

MR. PARDO: Okay. That is actually very help. Jim Pardo, for Exxon Mobil, your Honor. That's very helpful, your Honor.

THE COURT: I don't know why, but, good.

MR. PARDO: No, it is because it's always helpful when you encourage us to talk, but let me see if I can push it a little further because I'd like a little more encouragement from you to them.

THE COURT: Okay.

MR. PARDO: On May 7th, I talked to you about two possible motions. One dealt with the fact that several defendants in this case just couldn't figure out why they were here. Those are conversations that should take place the next couple of weeks. Maybe we can get that worked out.

The other motion, though, pertains to these nonsite specific I1Y claims that have been asserted in the second Puerto Rico action. They are identical or virtually identical to the same island-wide nonsite specific claims that were asserted --

THE COURT: In Puerto Rico I?

MR. PARDO: -- eight years ago in Puerto Rico I, okay.

Our argument -- and you had this discussion with Ms. Hannebut and Ms. O'Reilly a year ago -- is they're either barred by the statute of limitations, because they clearly knew by 2007 when they filed the first case, or at a minimum, they're barred by the prior pending action. You said this an hour ago, I don't need any more motions. We don't want to burden you with this motion, and a year ago, you said I don't really want this to be a motion, they shouldn't be in the second.

THE COURT: I still think that, at least listening to one side; it's always very convincing when one side is heard. But you make it sound right, either prior pending or statute of limitations, island-wide nonspecific site claims are gone. They're seven years too late at least. I understand your point, but I'd like the plaintiff to get to that point themselves or explain why not.

Mr. Gilmour.

MR. GILMOUR: Yes, your Honor. If I might just for a moment talk about the May 7th teleconference that Mr. Pardo is referencing. We did have that conversation. You may also remember, your Honor, that Mr. Kauff explained to you, Scott Kauff, that there were additional new defendants that were added, either 12 to 18, and you yourself said, your Honor, that -- we represented that we did not believe the prior

pending action doctrine would apply to them. You yourself said that sounds right to me, Mr. Pardo, do you agree. He also said, I think that's right.

THE COURT: But there's still the statute of limitations.

MR. GILMOUR: Yes, your Honor. And to the extent that we can have those conversations with defendants, we will.

THE COURT: Okay, good. That's all I'm saying, do it now, do it fast. The motion date is June 29th. I would be amenable if they sit down with you quickly to letting that slip by a week or so. But this has got to get briefed, too, if I have to do it.

MR. PARDO: We don't want to have to do it.

THE COURT: I agree.

MR. PARDO: Let me say this, though. I'm not afraid to admit when I'm wrong. When I said that the prior pending action doctrine -- on that call, when I said, yeah, that sounds right to me, I was wrong.

THE COURT: Even if they weren't parties?

MR. PARDO: Even if they weren't parties. And there's Southern District case law on this cited in our letter to them on June 8th, you do not need identical parties between you. We got the same claims. Basically the same parties because most of the new parties are just subs or affiliates of parties from the first action. We got the same categories of parties.

Everything that needs to line up for invocation of the prior pending action doctrine lines up here.

THE COURT: They have two good answers. You have to see if this motion has to be made. I'm not going to be real happy if it's made, and it's open and shut.

MR. GILMOUR: Understood.

THE COURT: But you'll decide, Mr. Gilmour.

MR. GILMOUR: Yes, your Honor, understood. And, again, we're happy to discuss it with them.

MR. PARDO: Did we pick the date --

THE COURT: Not yet. If I hear that you sit down and are really talking, and I get a joint letter saying we are talking after the conference with you where you were so strong in your encouragement we actually met, could we have another ten days, I'm inclined to say yes, but I don't want to do it now. If they're not going to sit down with you, you have to make a motion June 29.

MR. PARDO: I like that approach.

THE COURT: If they don't sit down in the next few days, you start writing.

MR. PARDO: All right. Fair enough.

MR. GILMOUR: Thank you.

THE COURT: And that was the last -- I think the last item on my agenda.

Is there anything else anyone of the vast number of

lawyers here wants to raise?

MR. AXLINE: Next conference, your Honor?

THE COURT: That's always a good one. Do you have a suggestion? When will it be ripe, so to speak? I'm trying to think what dates. Nothing really was set here that would affect the next conference. I want to get that CMO hammered out in Pennsylvania, I've given guidance on that. So it sounds like the usual, one month. Sort of mid to late July?

MR. AXLINE: Yes.

THE COURT: When everybody's away.

MR. AXLINE: Particularly for the CMO. I think it's more likely people will be gone in August.

THE COURT: Okay. It's nice that some people take vacations. Anyway mid to late July.

Any suggestions? They're all the same to me. You know what days you prefer traveling. You don't like Mondays and Fridays, right?

MR. AXLINE: Correct.

MR. PARDO: No.

MR. AXLINE: I don't have a calendar in front of me --

THE COURT: Tuesday, Wednesday or Thursday.

MR. AXLINE: Right, the last week in July.

MR. PARDO: Well, that would be the 30th is a Thursday, the 23rd is also a Thursday. It's the third --

THE COURT: I think one of those, I might be away.

The ABA has me for something. One second.

Oh, ABA is the very last week, so I guess like the 29th. So everything is good except the 29th and 30th. Those aren't good, but everything else is.

MR. PARDO: The 28th is a Tuesday, your Honor.

THE COURT: That's okay. I like it. 28th at 2:30?

MR. PARDO: Sure.

THE COURT: Done. July 28th at 2:30.

Okay. Everyone, good to see you.

COUNSEL: Thank you, your Honor.

(Adjourned)